Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

Chicago's Partnership for Equal Justice

April 25, 2008

Marissa Hernandez
U.S. Immigration and Customs Enforcement
425 I Street, NW
Suite 100
Washington, DC 20536

Re: Comment Regarding Supplemental Proposed Rule, *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis*, 73 FR 15944 (March 26, 2008), DHS Docket No. ICEB-2006-0004

Dear Ms. Hernandez:

The Chicago Lawyers' Committee for Civil Rights Under Law (CLC) is the public interest law consortium of Chicago's leading law firms. CLC works to reduce barriers to employment that prevent African-American, Latino, and other minority workers from obtaining and keeping good paying jobs. CLC submits this comment to the Department of Homeland Security (DHS) to express serious concerns regarding the above-mentioned Supplemental Proposed Rule because the rule would result in unjustifiable job loss for many U.S. citizen workers, with minority workers and young workers especially likely to face loss of employment.

U.S. citizen workers will bear the brunt of the Supplemental Proposed Rule. The Supplemental Proposed Rule does not change the substance of the previously-published Final Rule, *Safe Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 FR 45611 (Aug. 15, 2007). As a result, if this Supplemental Proposed Rule is adopted, an employer would effectively be required, upon receipt of a letter from the Social Security Administration (SSA) stating that the name and/or social security number of an employee does not match SSA's records (a "no-match letter"), to fire the named worker if she does not resolve the discrepancy. Depending on how quickly the employer acts, the worker may have as few as fifty-five days to fix the problem with SSA.[1] Although DHS has framed the issue as one of immigration enforcement, SSA estimates that nearly

[1] The Final Rule would require an employee to resolve a no match with the SSA within ninety days of the date the employer received a no-match letter from SSA. 72 FR at 45624. However, an employer would have up to thirty days of this ninety-day period to check its own records for typographical or clerical errors, *id.*, and a further five days to notify the employee that the employer was unable to resolve the no match and request that the employee fix the discrepancy with SSA. Supplemental Proposed Rule, *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis*, 73 FR 15944, 15951 (March 26, 2008).

thirteen million errors in its database that would generate no-match letters (seventy percent of the total errors in the database) pertain to U.S. citizens.[2] There are many reasons other than unlawful immigration status why an employee may receive a no-match letter, including errors in the SSA database, typographical errors made by the employer in completing the Form W-2, or an employee name change due to marriage or divorce.[3] Under the Supplemental Proposed Rule, a U.S. citizen worker whose name appears on a no-match letter would, in order to keep her job, have to meet a heightened standard of proof that she is in fact a U.S. citizen, even if the no match is not the worker's fault.

Minority workers are more likely than white workers to have no-match letters sent to their employers. The Supplemental Proposed Rule incorrectly states that no-match letters "are only sent to employers whose wage reports reveal at least 11 workers with no-matches, and where the total number of no-matches represents more than 0.5% of the employer's total Forms W-2 in the report" and that, as a result, "[e]mployers with stray mistakes or *de minimus* inaccuracies in their records do not receive employer no-match letters."[4] In fact, SSA's practice has been to send a no-match letter concerning an individual worker to her employer if SSA can not reach the individual at her home address, often because the worker has moved.[5] In 2002, for example, SSA sent approximately 1.9 million letters to employers regarding individual employee no-matches.[6] Nothing in the language of the Rule limits its application to no-match letters referencing multiple workers, as opposed to no-match letters that reference a single employee.[7]

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[2] CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE at ii, 6 (Office of the Inspector General, Social Security Administration, Dec. 2006).

[3] SSA, *Handling Inquiries Relating to SSA Letters on No-Match Names and Social Security Numbers (SSNs)*, SSA Program Operations Manual System (POMS), RM 01105.0527, available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0101105027!opendocument.

[4] Supplemental Proposed Rule, 73 FR at 15949-50.

[5] SSA, *Handling Inquiries Relating to SSA Letters on No-Match*, *supra* (explaining that individual no-match letters are first sent to the address on the worker's Form W-2, but if a valid address is not available the letter is then sent to the employer).

[6] AUDIT REPORT: EFFECTIVENESS OF DECENTRALIZED CORRESPONDENCE SENT TO EMPLOYERS at 2 (Office of the Inspector General, Social Security Administration, Sept. 2006).

[7] *See* Final Rule, 72 FR at 45623 (referring generally to "[w]ritten notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records").

The minority home-ownership rate is far lower than that of white households.[8] Since renters move more frequently than homeowners, an individualized no-match letter is significantly more likely to be sent to the employer of a minority worker than to the employer of a white worker. In other words, because of the fact of increased housing instability among minority workers, what would otherwise be a private matter between an individual employee and SSA becomes an employment issue that will lead to a disproportionate number of minority workers losing their jobs.

Minority workers are less able to afford the time and expense to resolve no-match problems. Under the Supplemental Proposed Rule, if a no match does not result from an employer error, the affected employee must travel to an SSA office to attempt to resolve the discrepancy. Many workers, especially in rural and suburban areas, live far from the closest SSA office and, to make matters more difficult, minorities have a substantially lower rate of private car-ownership than do whites.[9] In addition, SSA offices are typically open only on weekdays during daytime business hours,[10] requiring workers in many instances to miss work in order to attempt to resolve a no match. As currently written, the Rule does not prohibit an employer from firing a worker for missing work for attempting to resolve a no match, a problem that is especially acute for minority workers, since minority workers are significantly more likely than white workers to be employed in low-wage industries where benefits such as personal and vacation days are either very limited or not provided at all. Nor does the Rule require an employer to pay a worker for traveling to SSA to attempt to resolve a no match.

Where neither the worker or SSA is able to resolve the no match within 90 days, the Supplemental Proposed Rule requires the employee to complete a new Form I-9 and, in cases where the employee is a U.S. citizen, to provide her employer with a passport or an original or certified copy of a birth certificate rather than a Social Security Card within three days in order to keep her job.[11] The vast majority of U.S. citizens do not have a passport,[12] and undoubtably many workers do

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[8] U.S. Dept. of Housing and Urban Development, *Barriers to Minority Homeownership*, June 17, 2002 (stating that the minority home-ownership rate was 25.3% lower than the white home ownership rate), available at **http://170.97.67.13/news/releasedocs/barriers.cfm**.

[9] Steven Raphael and Michael A. Stoll, *Can Boosting Minority Car-Ownership Rates Narrow Inter-Racial Employment Gaps?* at 1, 12, Working Paper, Joint Center for Poverty Research, Northwestern University (June 2000) (summarizing car ownership data by race and stating that "[r]acial differences in car-ownership rates are large, comparable in magnitude to the black-white differences in home-ownership rates.").

[10] For example, the hours of the SSA office in Chicago's Loop are Monday through Friday, from 9:00 a.m. until 4:00 p.m.

[11] The Rule would require, for re-verification purposes, that the employer not accept "any document that contains a disputed social security number ... to establish employment authorization...." Final Rule, 72 FR at 45624. In any case involving an unresolved no match between a name and social security number, the social security number presumably would be

not have an original or certified copy of their birth certificate readily available either. Again, the Rule does not protect workers from being fired for missing work to obtain a certified copy of a birth certificate, nor does the rule require an employer to pay a worker for the time and expense necessary to purchase such a birth certificate.

Young workers face special burdens under the proposed rule. The current version of the Form I-9 permits workers under the age of eighteen to establish identity for purposes of employment eligibility verification by providing a school or hospital record, since many young people do not have a driver's licence or other form of government-issued photo identification. However, under the Supplemental Proposed Rule, if an employer of a young worker receives a no-match letter and neither the worker or SSA is able to resolve the no-match within ninety days, the young worker is required to complete a new Form I-9 and provide a photo ID within three days or the employer must fire her.[13] Three days is an exceptionally short period for a young worker to obtain a photo ID for the first time.

If DHS decides to adopt the no-match rule, CLC encourages the agency to revise the Supplemental Proposed Rule to incorporate the exceptions to the identity document requirements for workers under eighteen currently contained in Form I-9.

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considered "disputed" and the employer would require the employee to provide an alternative document to prove employment eligibility. As a practical matter, other than a Social Security Card, the only other documents commonly held by U.S. citizens that can establish employment eligibility for purposes of Form I-9 are birth certificates and passports. *See* Form I-9, Employment Eligibility Verification (listing also Certification of Birth Abroad issued by State Dept., Native American tribal document, and U.S. Citizen ID Card as sufficient to establish employment eligibility).

[12] AN UPDATE OF THE POTENTIAL IMPACT OF THE WESTERN HEMISPHERE TRAVEL INITIATIVE ON CANADA'S TOURISM INDUSTRY at 8, Table 1 (The Conference Board of Canada, Aug. 2006) (stating, based on a 2005 household survey, that only 34% of U.S. residents of age 18 and over possess a valid U.S. passport).

[13] The Rule requires that, for re-verification purposes, the employee "must present a document that contain a photograph in order to establish identity or both identity and employment authorization." Final Rule, 72 FR at 45624. As a practical matter, in order to satisfy the requirements of Form I-9, most young workers will have to provide either a driver's license or other photo ID issued by their state of residence. Although a school ID with a photograph would also satisfy Form I-9, many young workers are not enrolled in school and, in any case, many school IDs do not contain photographs.

The bottom line: At a time of economic downturn, the Supplemental Proposed Rule will make an already-bad employment situation worse for minority and young workers. In March 2008, while the overall national unemployment rate was 5.2%,[14] the unemployment rate for African-American workers stood at 9.0 %[15] and the figure for Latino workers was 7.3%.[16] For workers under the age of twenty the situation was even worse, with 31.3% of young African-American job-seekers facing unemployment,[17] while the rate for young Latino workers was 17.8%.[18] Given the barriers that minority workers already face in obtaining and keeping employment, the Supplemental Proposed Rule is the wrong policy at the wrong time for minority communities.

For the above-listed reasons, the Chicago Lawyers' Committee for Civil Rights Under Law urges DHS not to adopt the no-match rule. If the Rule is adopted, the Lawyers' Committee strongly encourages DHS to add additional protections for minority and young workers.

Sincerely,

Clyde E. Murphy
Executive Director

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[14] U.S. Dept. of Labor, The Employment Situation March 2008, Table A-1: Employment status of the civilian population by sex and age (April 4, 2008), available at **http://www.bls.gov/news.release/empsit.toc.htm**.

[15] *Id.* at Table A-2: Employment status of the civilian population by race, sex, and age.

[16] *Id.* at Table A-3: Employment status of the Hispanic or Latino population by sex and age.

[17] *Id.* at Table A-2: Employment status of the civilian population by race, sex, and age.

[18] *Id.* at Table A-3: Employment status of the Hispanic or Latino population by sex and age.